

No. 22105

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBOLD LABORATORY, INC. and
MILTON HERBOLD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

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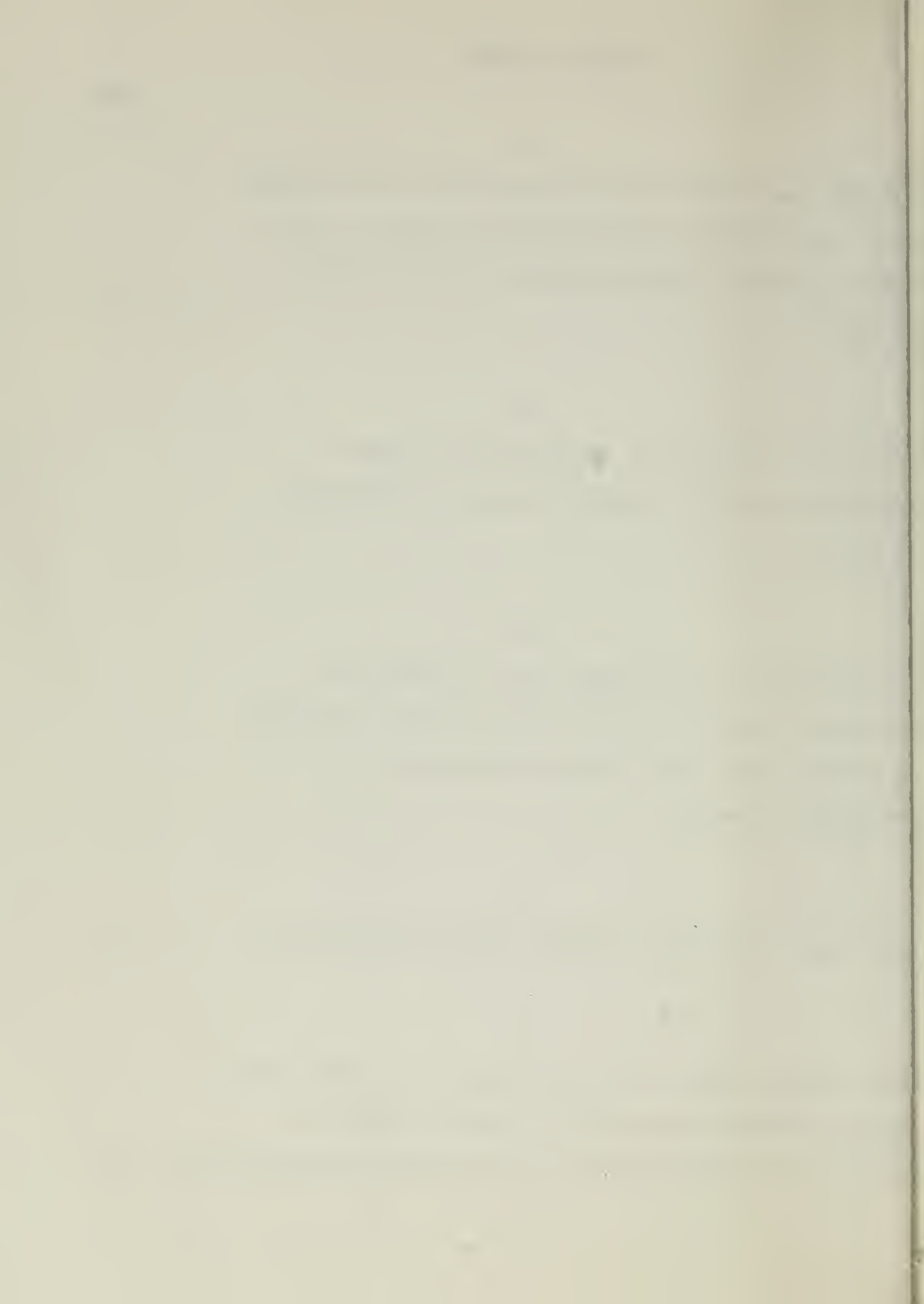


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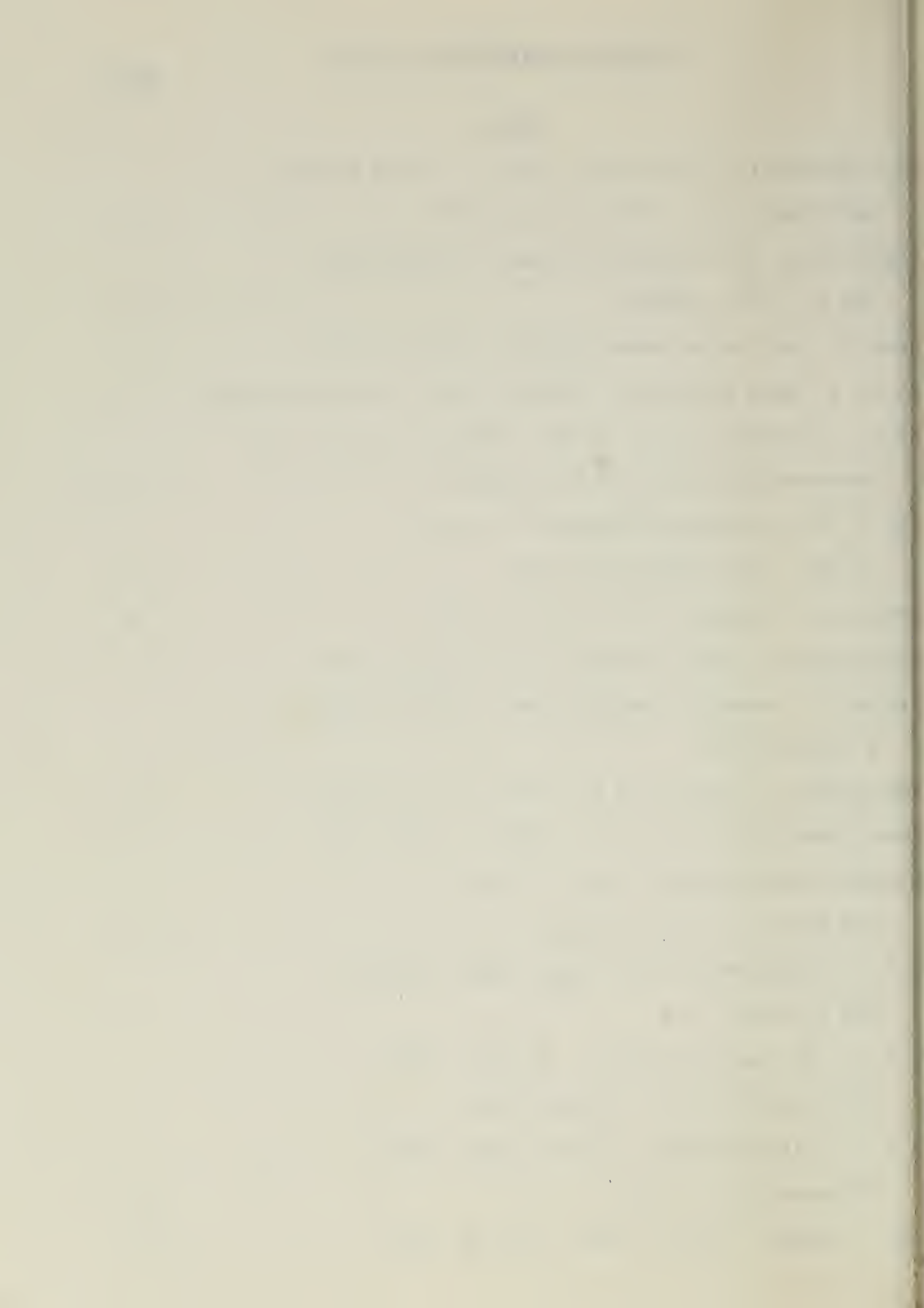
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The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry should be supported by a valid receipt or invoice. The second part outlines the procedures for handling discrepancies and errors, including the steps to be taken when a mistake is identified. The final section provides a summary of the key points and offers advice on how to prevent future errors.

This section details the specific requirements for the reporting process. It includes a list of the documents that must be submitted along with the report, such as bank statements and tax forms. It also describes the timeline for submitting reports and the consequences of late or incomplete submissions. The text further explains how to calculate and report on various financial metrics.

The following part of the document addresses the issue of confidentiality and data protection. It states that all information provided in the reports is treated as confidential and is only shared with authorized personnel. It also outlines the measures taken to ensure the security of the data, including the use of secure communication channels and access controls. The text concludes with a statement of commitment to transparency and accountability.

The document concludes with a final summary and a call to action, encouraging all stakeholders to adhere to the guidelines and maintain the highest standards of integrity and accuracy in their reporting.

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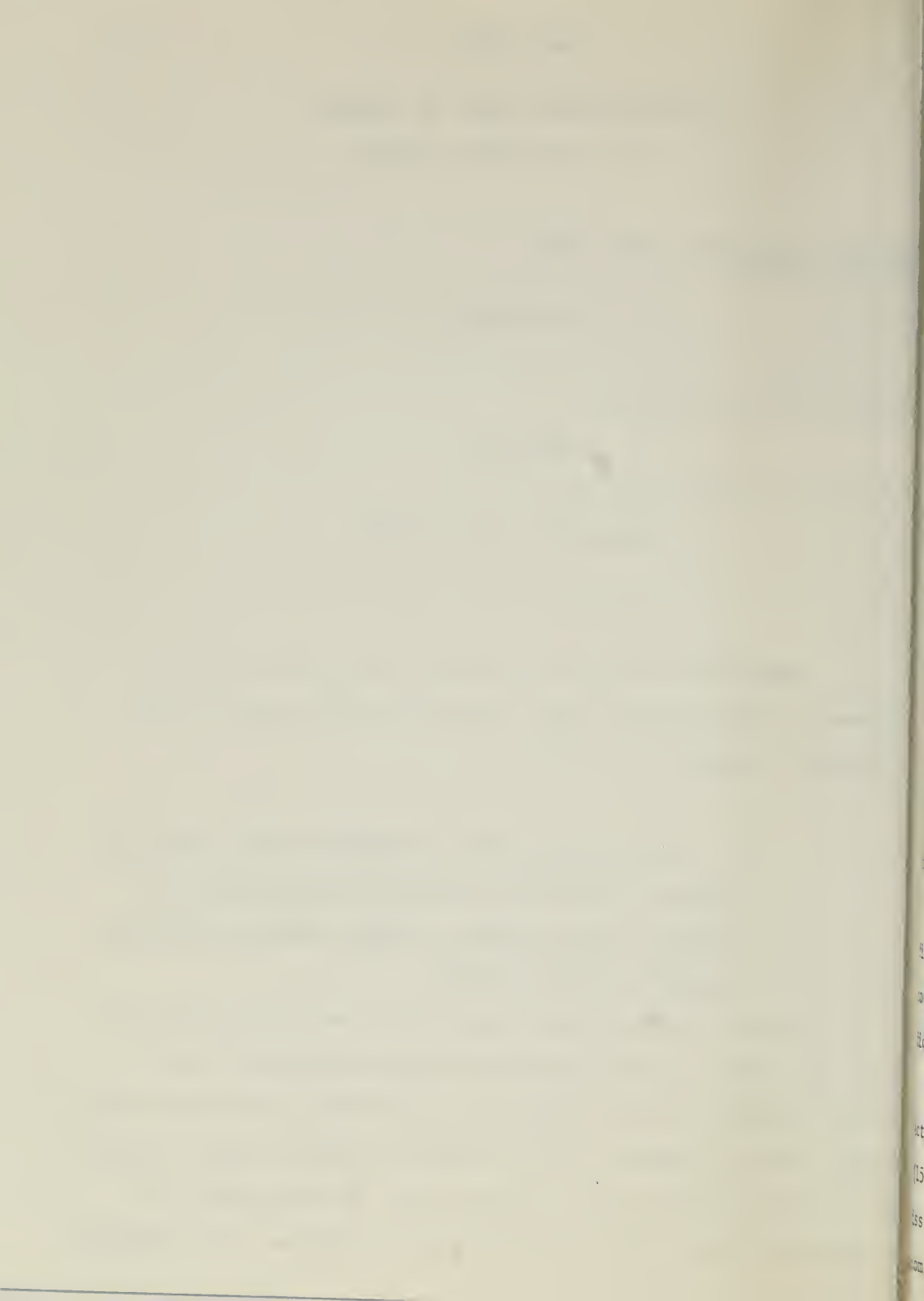
Appellee.

APPELLANTS' REPLY BRIEF

Appellants prefer to and will follow the order of argument of the Opening Brief rather than the reverse order contained in appellee's brief.

I. APPELLEE HAS WHOLLY FAILED TO SHOW THAT THE DISTRICT COURT HAD STATUTORY JURISDICTION OR GENERAL EQUITY POWER TO GRANT INJUNCTIVE RELIEF IN THIS PENALTY ACTION.

In our opening brief (pp. 17-45), we argued that the District Court (1) had no statutory power under the Act to enjoin possible future violations of the final Cease and Desist Order, because Congress had provided an adequate legal remedy; (2) but that if the court did have such jurisdiction, the granting of such relief was error in the absence of a complaint



alleging facts and evidence showing, and findings determining, that in all probability the acts enjoined would be committed by defendants in the future unless defendants were enjoined; that such acts would result in substantial injury to plaintiff, that failure to grant the injunction would result in irreparable injury to plaintiff, and that plaintiff did not have an adequate legal remedy (Br. 27-30). Since appellee does not seem to be clear as to the basis of appellants' contentions (Appellee's Br. p. 20), we will restate them.

The first contention is predicated on the undisputed rule that District Courts are of limited jurisdiction which must find their jurisdiction in specific statutory grants. Such jurisdiction is never presumed. Instead, it is presumed the court is without jurisdiction and the burden is on appellee to demonstrate that the court has such jurisdiction (Br. 26-27). Appellee has not questioned these well established rules.

The District Judge conceded that Section 5(L) (15 U.S.C. §45(L)) contains no provision for an injunction (C.T. 104:18-21) and appellee has not contended otherwise.

It follows that the court was without statutory jurisdiction under Section 5 to grant injunctive relief enforcing compliance with the final Cease and Desist Order. If such jurisdiction existed, it must be found elsewhere.

In searching for statutory jurisdiction in the F.T.C. Act, the court relied upon the fourth paragraph of Section 9 (15 U.S.C. §49) conferring jurisdiction on District Courts to issue writs of mandamus in certain cases, commanding persons to comply with certain provisions of the Act or orders of the

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Commission.

The fallacy of this position is that mandamus is a legal and not an equitable remedy. When the legal remedy of mandamus is available, the injunctive remedy is not, because mandamus provides an adequate legal remedy at law (Br. 35:20-22). It follows that since the legal mandamus remedy does not confer equitable jurisdiction, that provision did not carry with it the inherent powers of an equity court.

In our opening brief, we cited specific provisions of the Act which conferred jurisdiction to grant injunctive relief in certain cases. Those provisions conferred such jurisdiction on the Courts of Appeal in certain cases and upon District Courts in others (Br. 20-22).

Appellee complains (Br. 24-26) that appellants failed to discuss the court's view that subsections (c) and (d) of Section 5, vesting exclusive jurisdiction in the Court of Appeals over Cease and Desist Orders, applied only to cases in which a petition for review was filed. There are several reasons we did not refer to this holding of the court. First, we referred to subsections (c) and (d) conferring exclusive jurisdiction on the Court of Appeals to emphasize that subsection (L), providing pecuniary penalties for violation of final Cease and Desist Orders, contains no comparable provision empowering District Courts to make orders enforcing final Cease and Desist Orders. Instead, subsection (L) provides that the sole remedy for such violations is a civil action to recover pecuniary penalties. Second, we do not read the Wheeler-Lea Act as disclosing an intent to provide one remedy for violation of a non-reviewed final Cease and Desist Order and a different remedy for viola-

tion of such a reviewed Order. The Wheeler-Lea Act does not provide that a District Court has power to issue an injunction to require compliance with or prohibit violation of either a reviewed or a non-reviewed Order. It would be strange to hold that a District Court had jurisdiction to enforce an order made by the Court of Appeals. Third, we are not as sure as appellee seems to be that the court's view of subsections (c) and (d) is correct, in light of the Supreme Court decision in the Jantzen case, 386 U.S. 228, 18 L.Ed.2d 11, holding that the Court of Appeals had jurisdiction under substantially identical Clayton Act provisions to enforce a final consent Cease and Desist Order, from which no petition to review had been filed, and which had become final more than six years before the petition for enforcement was filed.

Appellee's statement (Br. 27) that "appellants' whole case turns on the question of whether the Court of Appeals was vested with exclusive jurisdiction to enforce final Cease and Desist Orders" and on the Parkinson case, is completely erroneous.

It is appellants' contention that Congress has not vested District Courts with jurisdiction to enforce by injunction final Cease and Desist Orders, whether or not those Orders were reviewed by the Court of Appeals. The sole jurisdiction of the District Courts is imposition of pecuniary penalties under Section 5(L). Our contention would be the same if there were no subsections (c) and (d).

We think that the Parkinson decision is still the law and that it is not overruled or weakened by the DeMario case for the reasons stated in our opening brief (pp. 32-33).

Apparently, appellee has failed to understand the thrust of appellants' contention which we have just restated. Of course, when a petition to review a Cease and Desist Order is filed with the Court of Appeals, jurisdiction over the Order is transferred from the Commission to the Court, which has exclusive jurisdiction to make its own order enforcing or modifying the Commission Order (Br. 17-18, 21).

If, after the Order of the Court of Appeals is final, the Cease and Desist Order should be violated, what is the remedy? The pecuniary penalty provisions of Section 5(L) are not limited to non-reviewed final Cease and Desist Orders, but applies to all orders of the Commission "to cease and desist after it has become final, and while such order is in effect." (Sperry-Rand Corp. v. F.T.C. 288 F.2d, 403, 405). Subsections (g), (h), (i) and (j) of Section 5 specify when a Cease and Desist Order is final. Once that Order has become final, whether with or without appellate court review, the defendants are subject to the same and no different remedies or sanctions in the District Court, viz., the imposition of pecuniary penalties. The District Court has no more jurisdiction to issue an injunction against a respondent who did not file a petition for review than it does to issue one against a respondent who filed such a petition which resulted in an order for enforcement. The only difference between the two situations is that the respondent in a case reviewed by the Court of Appeals may be subject to contempt proceedings in that court for violation of the Court of Appeals order (but not for violation of the Commission order.)

Appellee has ignored and not commented upon appellants'

contention that whenever Congress intended to confer jurisdiction upon District Courts to grant injunctive relief, it has been careful to do so in specific language. In each such case, the statutes were specific in limiting the power to the grant of temporary restraining orders or preliminary injunctions to maintain the status quo pending the issuance of complaints by the Commission seeking adjudicatory relief. None of these statutes provided for final injunctions or for preliminary injunctions or temporary restraining orders in actions to recover pecuniary penalties for violation of final Cease and Desist Orders (Br. 21-22). It is not without significance that Congress has specifically vested District Courts with the power to issue injunctive relief for violations of the Sherman Act (15 U.S.C. §4) and the Clayton Act (15 U.S.C. §§25, 26). No similar provisions are found in the F.T.C. Act.

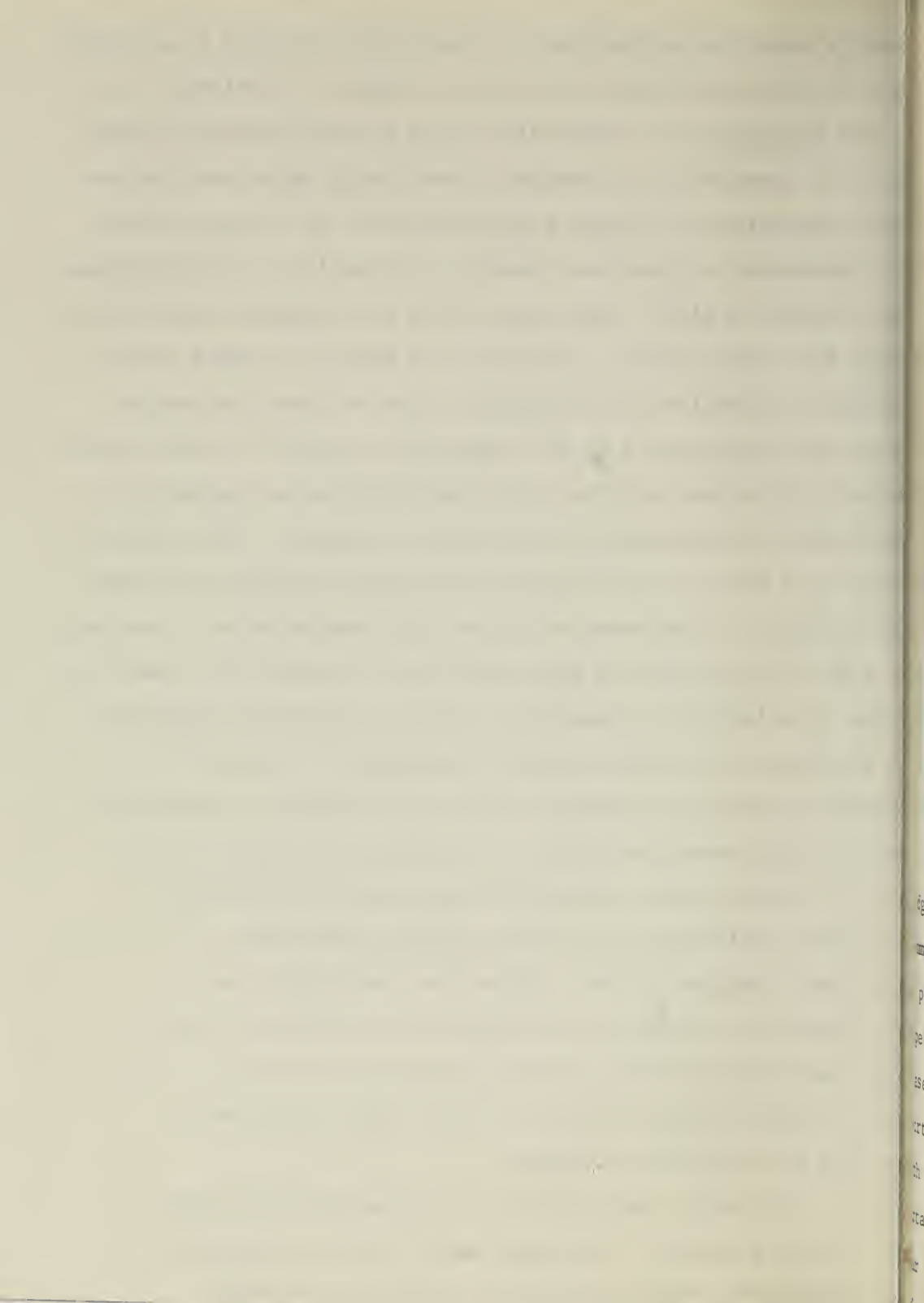
The Finality Act of 1959 (Section 11 of the Clayton Act, 15 U.S.C. §21) contains substantially identical procedural and penalty provisions to those in the Wheeler-Lea Act, but Section 15 of the Clayton Act likewise grants the equitable remedy of injunction. Could the Government have filed a civil penalty action against Jantzen in the District Court under Section 11(L) instead of applying to the Court of Appeals for an enforcement order? If it could, would the District Court have jurisdiction to issue an injunction or is its power limited to the imposition of a pecuniary penalty? If Jantzen should hereafter violate the Order, would the District Court have jurisdiction to issue an injunction enjoining Jantzen from violating the Cease and Desist Order issued in 1958? The case of F.T.C. v. Dean Foods Co., 384 U.S. 597, 16 L.Ed.2d 802, seems to lend some support to the



court's view that subsections (c) and (d) of Section 5 may apply only to the jurisdiction of Courts of Appeal in reviewed cases. In the Dean case, the Commission filed an application with the Court of Appeals for a temporary restraining order and preliminary injunction to enjoin the consummation of a merger which the Commission claimed was violative of Section 7 of the Clayton Act (15 U.S.C. §18). The court issued the temporary restraining order but after hearing, dissolved the same and denied the preliminary injunction upon the ground that no Cease and Desist Order had been entered by the Commission relative to the subject matter of the case and that the Commission had no authority to constitute the proceeding in the Court of Appeals. The Supreme Court in a five to four decision reversed, although the principal holdings of the court were that the Commission had standing to file the petition and that the Court of Appeals had power to issue a preliminary injunction. The four dissenting Justices, in an opinion by Justice Fortas, considered at length the various statutory provisions of Section 11 of the Clayton Act and in this connection said, in a footnote at Page 616-617:

"An FTC order under the Clayton Act is now final upon expiration of the time allowed respondent to seek judicial review. If he does not appeal the order and violates its terms after it becomes final, the Government may proceed, pursuant to statute (15 USC §§21(g) and (1), to seek civil penalties of up to \$5,000 per violation.

"In short, and contrary to the suggestion in the Court's opinion, the Commission's power to enforce compliance with its orders is and has been wholly



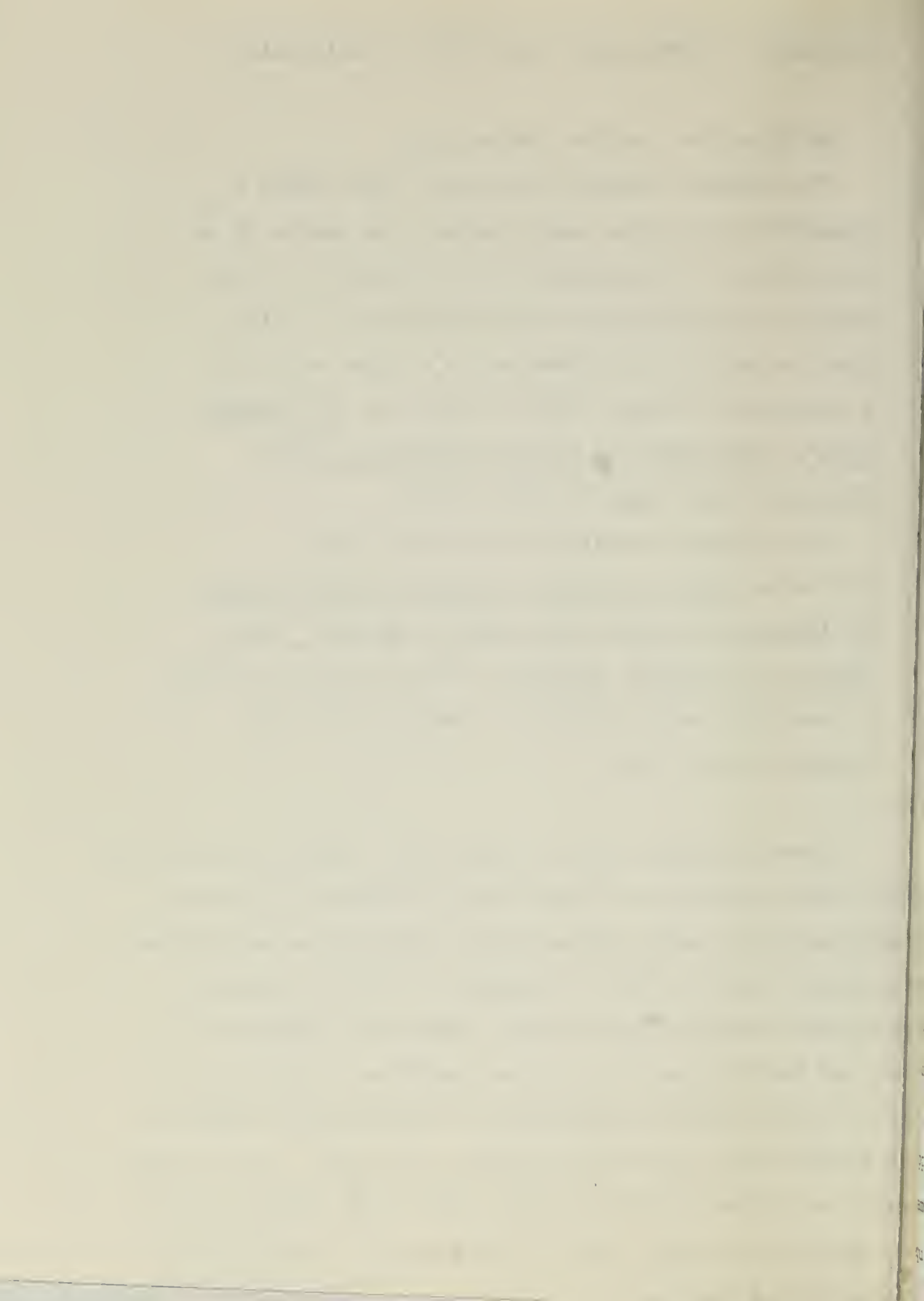
statutory. Nothing has been left to implication."

At Page 384, Justice Fortas said:

"By express statutory provision, even after a Commission order has been entered, the courts of appeals have no jurisdiction as to the merits of the merger, on application of the Commission. Only a party affected by the Commission's order may file a petition to review. If one does not, the Commission's sole remedy is to seek penalties in the district courts under 15 USC § 21(1).

"The statute contains its own 'all writs' provision which is clearly and specifically limited to instances in which the court of appeals' jurisdiction has already attached upon petition to review a Commission order filed by a person who is the target of that order."

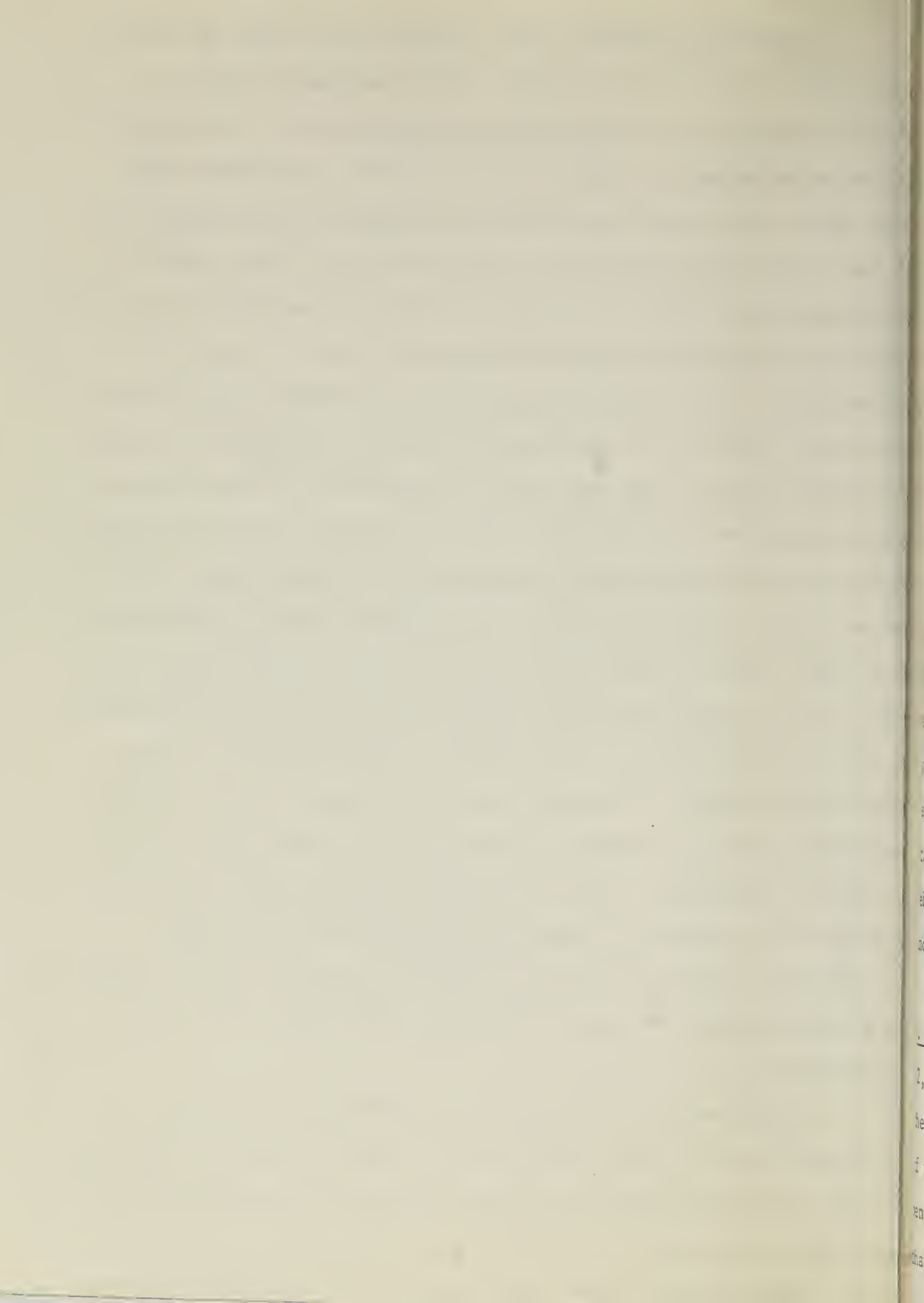
These excerpts tend to support the view of the District Judge that jurisdiction of the Court of Appeals to enforce a Commission order vests only upon the filing of an application or petition with the Court of Appeals. They also support appellants' position that the sole remedy for violation of a cease and Desist Order "is to seek penalties in the District courts" under Section 11(L) which is substantially identical with Section 5(L) (15 U.S.C. §§ 21(L) and 45(L)). We are not certain as to the weight that this dissenting opinion of the four Justices may have, but we find nothing in the majority



Appellee's statement (Br. 20-21, 27-28) that we cited Rule 81(b) F.R.Civ.P. to "support their arguments that the District Court has no equitable jurisdiction" is a clear and patent misstatement of appellants' position. We stated that Rule 81(b) "provides that writs of mandamus are abolished" in so far as the District Court's jurisdiction to issue them is concerned (Br. 35-36). Of course, District Courts have power to issue equitable writs and under Rule 65, this is clear as to injunctions. The fallacy of appellee's contention is that mandamus is a common law legal remedy and not an equitable remedy and hence, reliance by the court and appellee on the mandamus provision of Section 9 of the Act as providing the support for equitable injunctive remedy jurisdiction was misplaced and erroneous. We do not quarrel with the District Judge's statement (C.T. 106) that if the court had any equity jurisdiction in the case, all the inherent powers of an equity court were available to it, provided that such jurisdiction was invoked by proper pleading and proof. The mere fact that there may be a statute providing certain remedies, either legal or equitable, is not in itself sufficient. The remedy sought and granted must be specifically invoked by appropriate allegations and proof. But the court was in error in citing and relying upon the power to issue mandamus, a legal remedy, as conferring such equity jurisdiction.

Appellee has not questioned the authorities cited by appellant (Br. 35) that mandamus is a legal and not an equitable remedy and an application for such a writ is a legal and not an equitable proceeding.

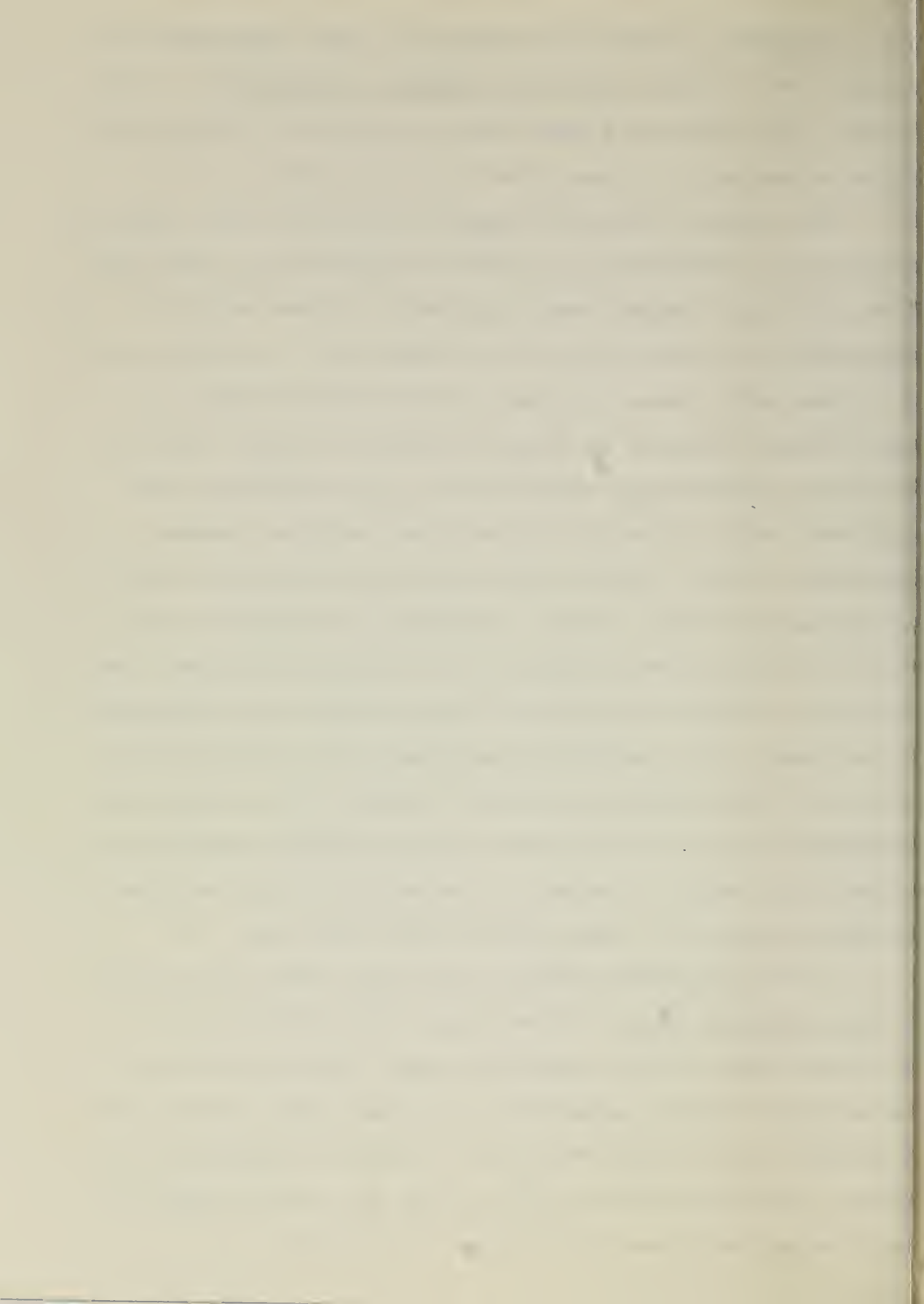
The complaint does not purport to be a petition for a



writ of mandamus; it does not contain the usual allegations of a petition for mandamus (55 C.J.S., Mandamus, §§265-272). On the contrary, the complaint states that the plaintiff "brings this action to recover civil penalties" (C.T. 2:21-22).

The second contention summarized above (P. 1-2), that if the court had jurisdiction to issue an injunction, it was error to do so for the reasons there set forth, is based upon the proposition that there are no fact allegations, no evidence, and no findings with respect to those essential facts which are always deemed necessary to support injunctive relief, that is, allegations and evidence showing that in all probability the defendants would violate the order if not enjoined, damage, irreparable injury, and the other essential allegations noted in our opening brief (pp. 27-29). Appellee's statement (Br. 19) that the injunction was requested on the grounds defendants had repeatedly violated the Cease and Desist Order is not supported by the record. The complaint alleged but four violations with respect to advertisements of Herbold Pomade, all involving substantially the same advertisement, three allegedly committed on February 10, 1965, the subject of Counts Three, Four and Five, and one on August 27, 1965, the basis for Count Six.

In its Memorandum Opinion, the court cited the case of U. S. v. Vitasafe Corp., 234 Fed.Supp. 710, affirmed 352 F.2d 62, as authority for the injunctive power. We are advised by the attorneys for the defendant in that case that "the question of whether the court has the power to issue an injunction in a penalty action under Section 5(L) of the Act was not raised in that case and was never passed upon by the court."



II. SINCE THE COURT HAD NO JURISDICTION TO GRANT INJUNCTIVE RELIEF, IT WAS AN ABUSE OF DISCRETION TO DO SO.

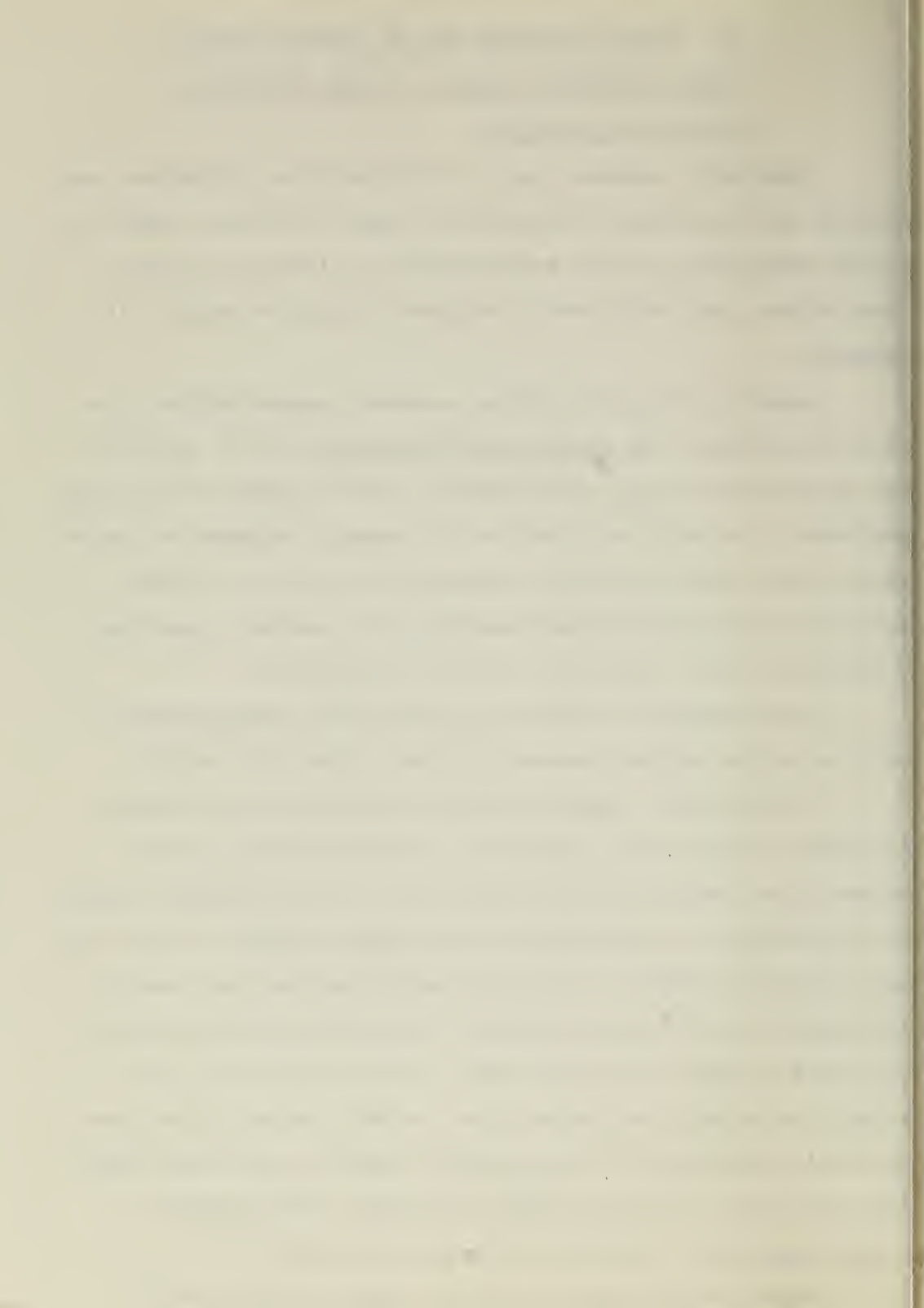
Appellee's argument (pp. 17-20) that the allegations and findings that appellants violated the Cease and Desist Order by causing publication of the advertisements, pleaded in Counts Three to Six, are sufficient to support injunctive relief, is untenable.

Appellee alleged in three separate complaints that the action was brought "to recover civil penalties" (C.T. 2:21-22). Such penalties were the only specific relief sought in the three complaints. In appellee's motion for summary judgment on Counts Three to Six, the only relief requested and the only relief granted by the court was the imposition of pecuniary penalties of \$500.00 on each Count, or a total of \$2,000.00.

The complaint is devoid of allegations showing that it would be in the public interest to grant injunctive relief.

At the trial, appellee did not introduce any evidence whatsoever to prove the allegations of Counts Three to Six, because those counts were disposed of as to the corporate defendant on appellee's counter motion for summary judgment, which the court granted. The court held as a matter of law that some of the language in the advertisements, the subject of those counts, violated the Cease and Desist Order. Since the court, in so ruling, had already determined that the sole relief to be granted was the imposition of the pecuniary penalty, we do not understand the basis for later adding injunctive relief merely because appellee's attorney in argument requested it.

Appellee is correct in stating that at the trial it

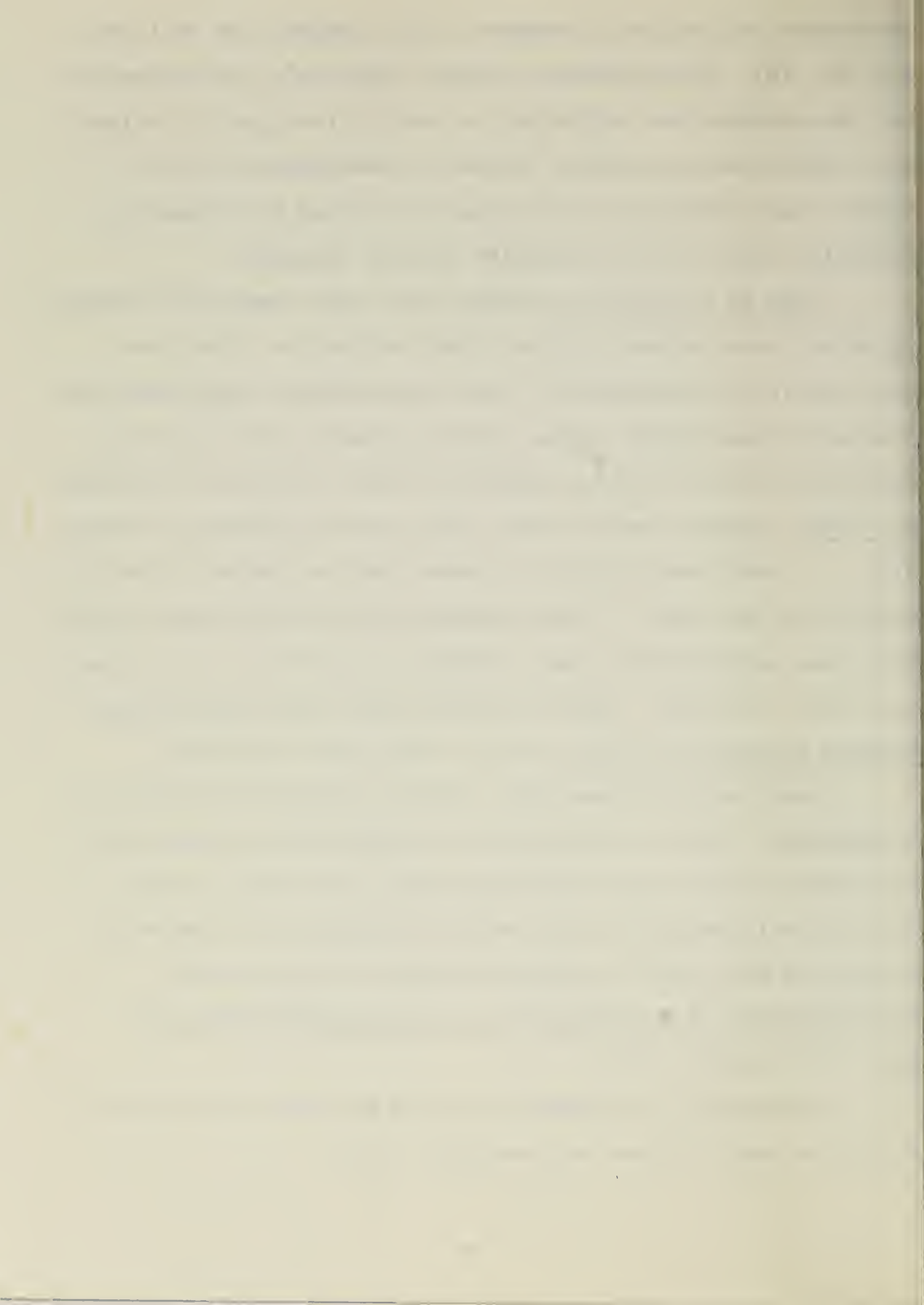


"introduced nothing new in support of its request for an injunction" (Br. 18). This admission refutes appellee's own contention that the evidence was sufficient to sustain the grant of injunctive relief, because nothing further or additional by way of evidence was introduced at the trial justifying superimposing injunctive relief on the penalties already assessed.

Rule 65 F.R.Civ.P. provides that every temporary restraining order issued without notice "shall define the injury and state why it is irreparable." Here the permanent injunction was in effect issued without prior notice because it was not even mentioned until the closing arguments made by appellee's counsel. Rule 65(d) further requires that "every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in its terms." The judgment does not meet these requirements, but merely states that plaintiff is entitled to an injunction (C.T. 97:20-25). This is insufficient. (See L. A. T. D. & Mortgage Exchange v. S.E.C. (9 Cir. 1959), 264 F.2d 199.)

Appellee's reference (Br. 18-19) to Rule 15(b) F.R.Civ.P. is misplaced, since no reference to an injunction was made until after the case was tried and being argued. The issue of the right to an injunction or the lack of pleadings or evidence to warrant the same were not tried by consent of the parties. (City Messenger of Hollywood, Inc. v. City Bonded Messenger, Inc., 254 F.2d 531, 537.)

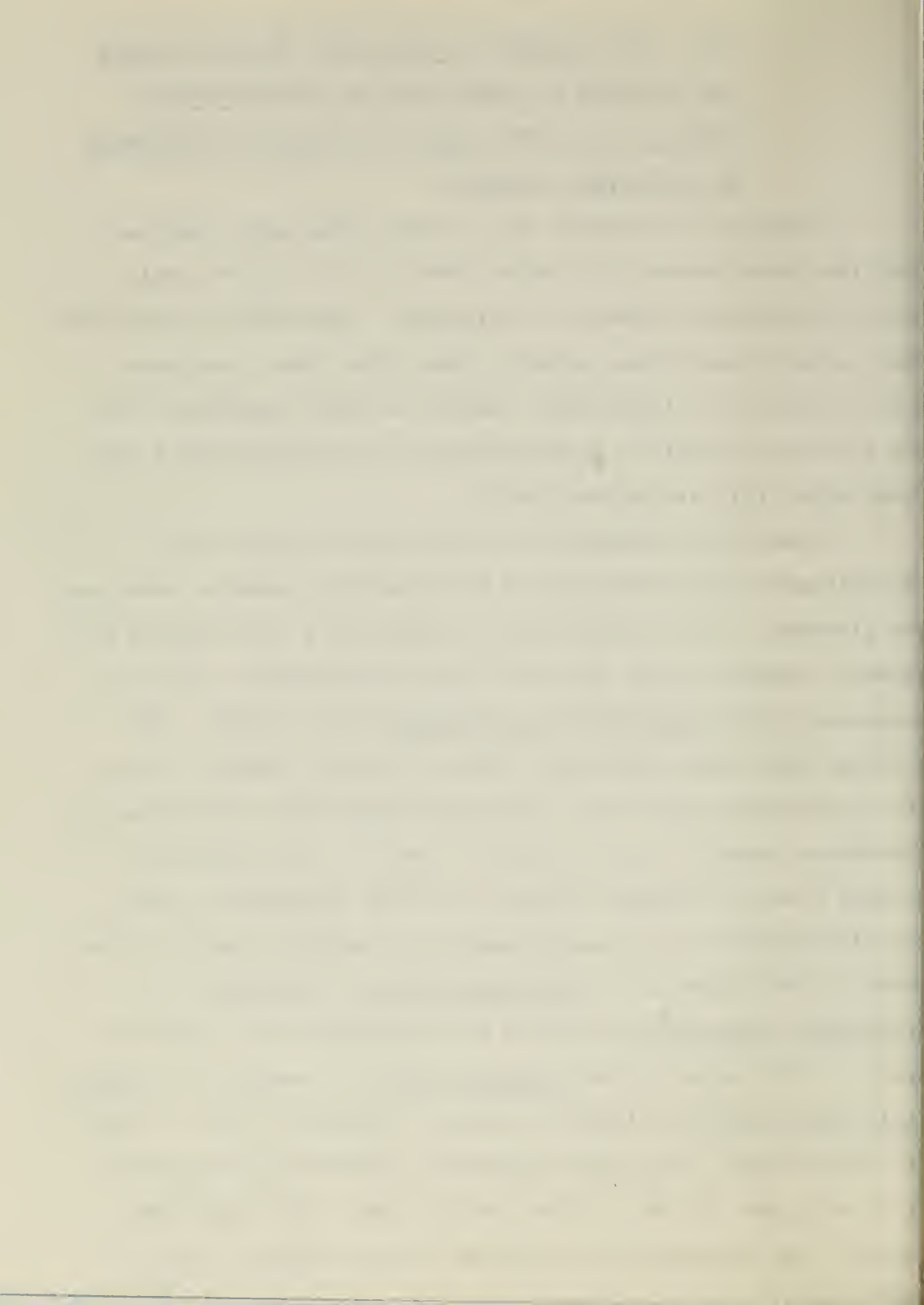
Furthermore, no request to amend the second amended complaint was made, nor was any amendment filed.



III. THE PLEADINGS DO NOT ADMIT AND NO EVIDENCE WAS RECEIVED TO PROVE THAT THE ADVERTISEMENTS INVOLVED IN COUNTS THREE TO SIX WERE DISSEMINATED IN INTERSTATE COMMERCE.

Appellee's statement (Br. 5) that appellants admitted that the advertisements in Counts Three to Six were disseminated in interstate commerce is erroneous. Appellee's contentions that judicial notice was properly taken that these newspapers were circulated in interstate commerce and that appellants cannot raise the question of dissemination for non-compliance with Local Rule 3(g)2 are without merit.

Appellee's contention that appellants admitted the advertisements were disseminated in interstate commerce misstates the pleadings. The findings made on appellee's cross-motion for summary judgment do not find that the advertisements were disseminated within the District of Columbia (C.T. 78-91). The findings made after trial were based on taking judicial notice that the "Evening Star" and "Washington Post" "are circulated in interstate commerce" (C.T. 96:16-19, par. 7). The complaint alleges that on or about February 10, 1965 "defendants caused the dissemination of an advertisement of 'Herbold Pomade' in the March 8, 1965 issue of the Washington Post, a newspaper of interstate circulation published in Washington, D. C., and the April 5, 1965 issue of the Virginian Pilot, a newspaper of interstate circulation published in Norfolk, Virginia." (C.T. 6, par. 16, Count Three). The same allegations are made in Count Four (C.T. 6-7, par. 20) as to "The Evening Star", the "Virginian Pilot", "The Richmond Times Dispatch" and the "Beacon Journal"



Similar allegations are made in Counts Five (C.T. 8, par. 24) and Six (C.T. 9, par. 28) with respect to the newspapers there mentioned.

The answer to these paragraphs (C.T. 29-30, par. 8) as to Count Three, admits that the corporate defendant on February 10 transmitted a letter to the Peoples Drug Stores in Washington, D. C., requesting it to schedule for publication an advertisement for Herbold Pomade containing the language set forth in advertisement mats forwarded to the drug store, and gave the dates and names of the newspapers in which the advertisements were to be published. It admits on information and belief that Exhibit D is a true and correct copy "of the advertisements published" in the "Washington Post" and "Virginian Pilot" on the dates specified. The defendant "denies all allegations of Paragraph 16 not expressly admitted." Similar admissions and denials are made with respect to Count Four, (Par. 20 of Complaint; C.T. 30, par. 11 of the Answer), Count Five (Par. 24 of the Complaint; C.T. 37, par. 14 of the Answer) and Count Six (par. 28 of the Complaint, C.T. 32, par. 17 of the Answer).

The answer further denies the allegations of Paragraphs 18, 22, 26 and 30 that the defendants caused the dissemination in interstate commerce of the pleaded advertisements. The defendants likewise denied, by the language above quoted, that they caused the dissemination of the advertisements and issues of the newspapers pleaded in the complaint, and denied such newspapers were newspapers "of interstate circulation".

Whatever the definition of interstate commerce may be in the Act, "interstate" in its ordinary context means between places or persons in different states (48 C. L. S. 116) and "circulation"

means the passing of something from place to place or from person to person. In the absence of evidence that the specific issues of Washington, D. C. newspapers pleaded in the complaint did pass from the District of Columbia to other states, there was no evidence to support the finding of the trial court unless the doctrine of judicial notice supplied such proof.

The foregoing summary is given to show that appellee's statement that defendants admitted that the advertisements were disseminated in interstate commerce is incorrect.

Irrespective of the definition of commerce contained in the Act, the Commerce Clause of the Constitution only authorizes Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes". (Constitution, Art. 1, Sec. 8, Clause 3).

The authorities cited by appellee with respect to judicial notice require no attention. We have shown in our Opening Brief (pages 50-54) that judicial notice may be taken only of matters of such general knowledge and notoriety that it is common and everyday knowledge in the jurisdiction where the case is heard, of a certain fact. It may be doubted that it is general knowledge in California that the described newspapers are circulated in interstate commerce.

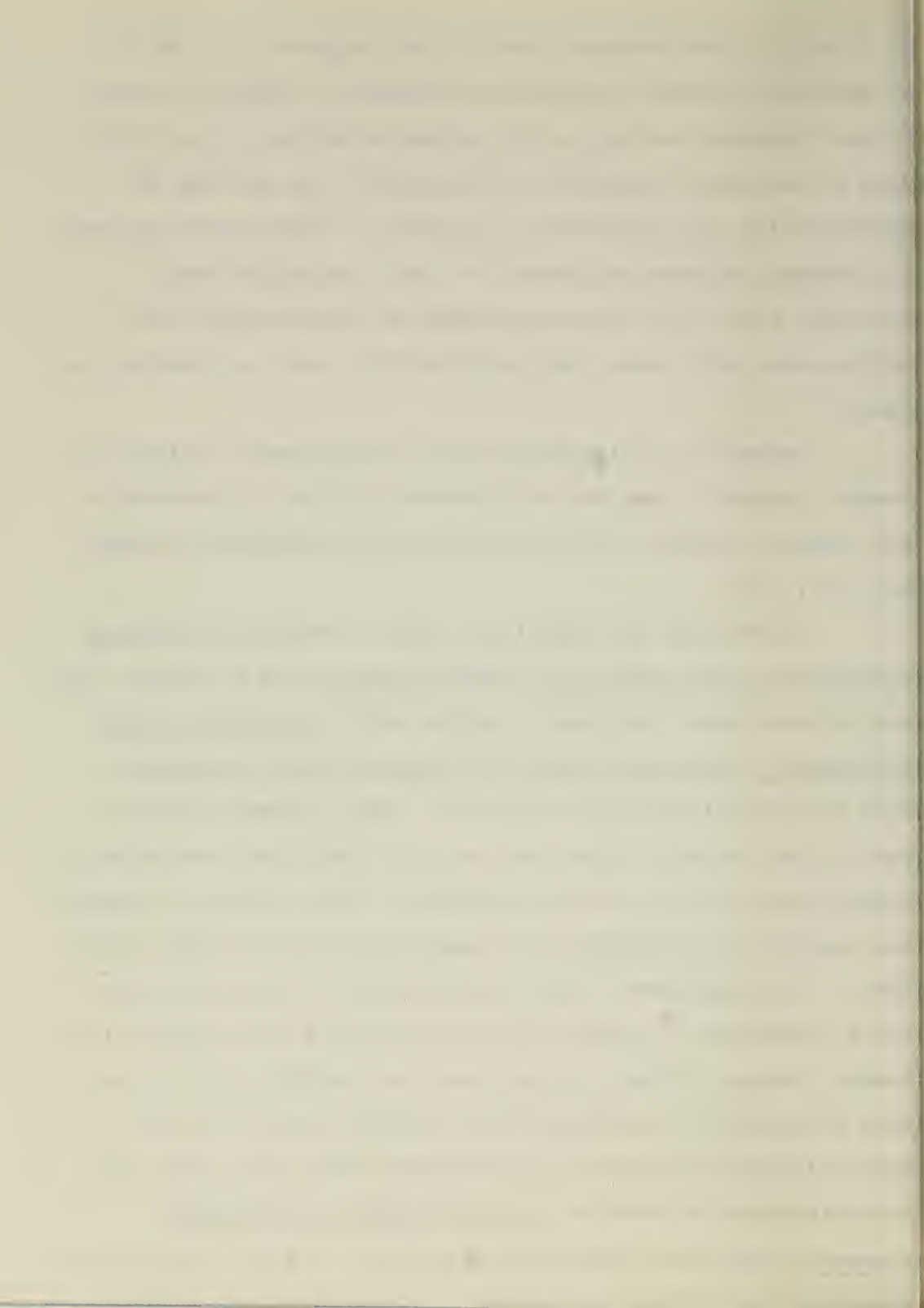
Appellee's statement that appellants cannot now raise the question of interstate commerce for failure to comply with Local Rule 3(g)2, is untenable. Appellee knows that: on September 16, 1966, appellants filed motions for summary judgment noticed for hearing on October 3, 1966 (C.T. 36-40). Appellants, in compliance with Local Rule 3, filed a statement of reasons in support

the following supporting documents including fourteen exhibits

(C.T. 41-75), and proposed findings and judgment (C.T. 80-87). At appellee's request, appellants extended its time to October 10 and continued hearing on the motion to October 31, on which date it was again continued to November 28. At no time did appellee file any objections or response to appellants' motions for summary judgment and under the same rule relied upon by appellee, this could have been deemed an admission that the motions were well taken, and justified the court in granting the same.

Instead of filing opposition to appellants' motions for summary judgment, appellee on November 17 filed a cross-motion for summary judgment in its favor as to the corporate defendant only (C.T. 78).

On November 25, appellants filed a memorandum opposing plaintiff's cross-motion for summary judgment and in further support of appellants' motions, together with a statement of the defendants' reasons why plaintiff's motion should be denied, with an affidavit of Milton Herbold. These documents are not part of the record in this case and are, therefore, not properly before the court for its consideration. Since, however, appellee has seen fit to go outside the record and refer to other matters (Br. p. 8), appellants offer to show that in their reply memorandum appellants, at pages 3-4, in referring to the motions for summary judgment filed by appellants and stating that they were upon the grounds "that there was no genuine issue as to the material fact dispositive of the charges made, i.e., that the advertisements in question, if disseminated in interstate commerce, when fairly read and interpreted, did not violate the



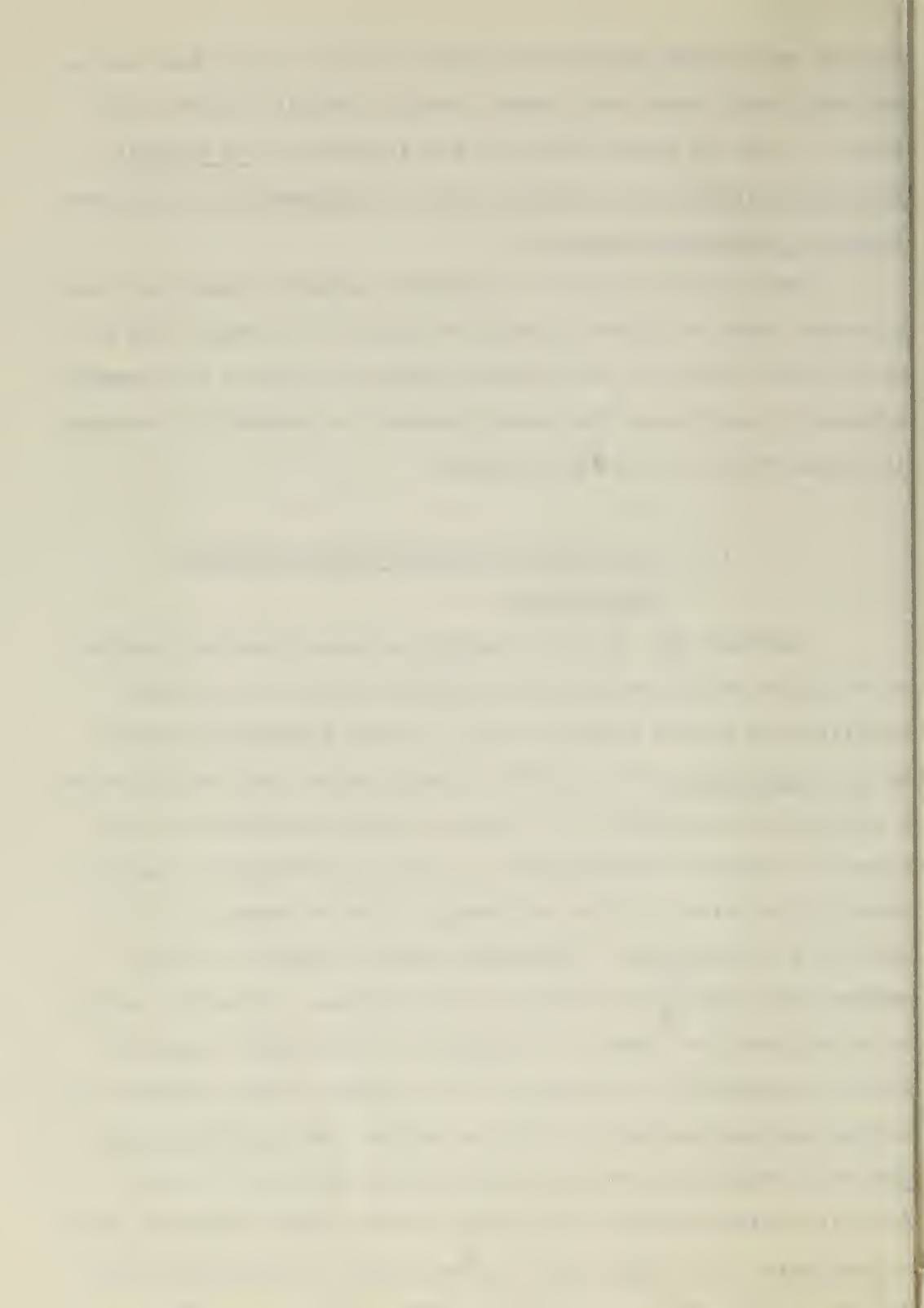
there is no further issue to be tried. If the Court does not so conclude, then there does remain certain factual issues to be tried . . . As to Counts Three to Six inclusive, the factual issue would remain as to whether the advertisements were disseminated in interstate commerce".

Not only is appellee's statement patently incorrect, but the court chose to ignore appellee's failure to comply with the local rules, and heard and granted appellee's motion for summary judgment by construing the advertisements as containing language violating the Cease and Desist Order.

IV. THE COURT WAS WITHOUT SUBJECT MATTER JURISDICTION.

Appellee (Br. 14-17) attempts to support subject matter jurisdiction, which results from failure to allege and prove certification of the facts by F.T.C. to the Attorney General. The St. Regis case, 355 F.2d 688, flatly holds that certification is mandatory and failure to allege and prove certification deprives the court of jurisdiction. Lack of jurisdiction may be raised at any stage of the proceeding, even on appeal, by the court of its own motion. Appellants have no way of knowing whether such certification was or was not made. Appellee refers to an affidavit of Joseph S. Saunders (Br. 15) which appellee did not designate for inclusion in the record. The affidavit is nothing but conclusions in which he states that on December 10, 1964 the Commission certified facts to the Attorney General which it believed showed violations of the Cease and Desist Order and requested "that appropriate proceedings be instituted" and

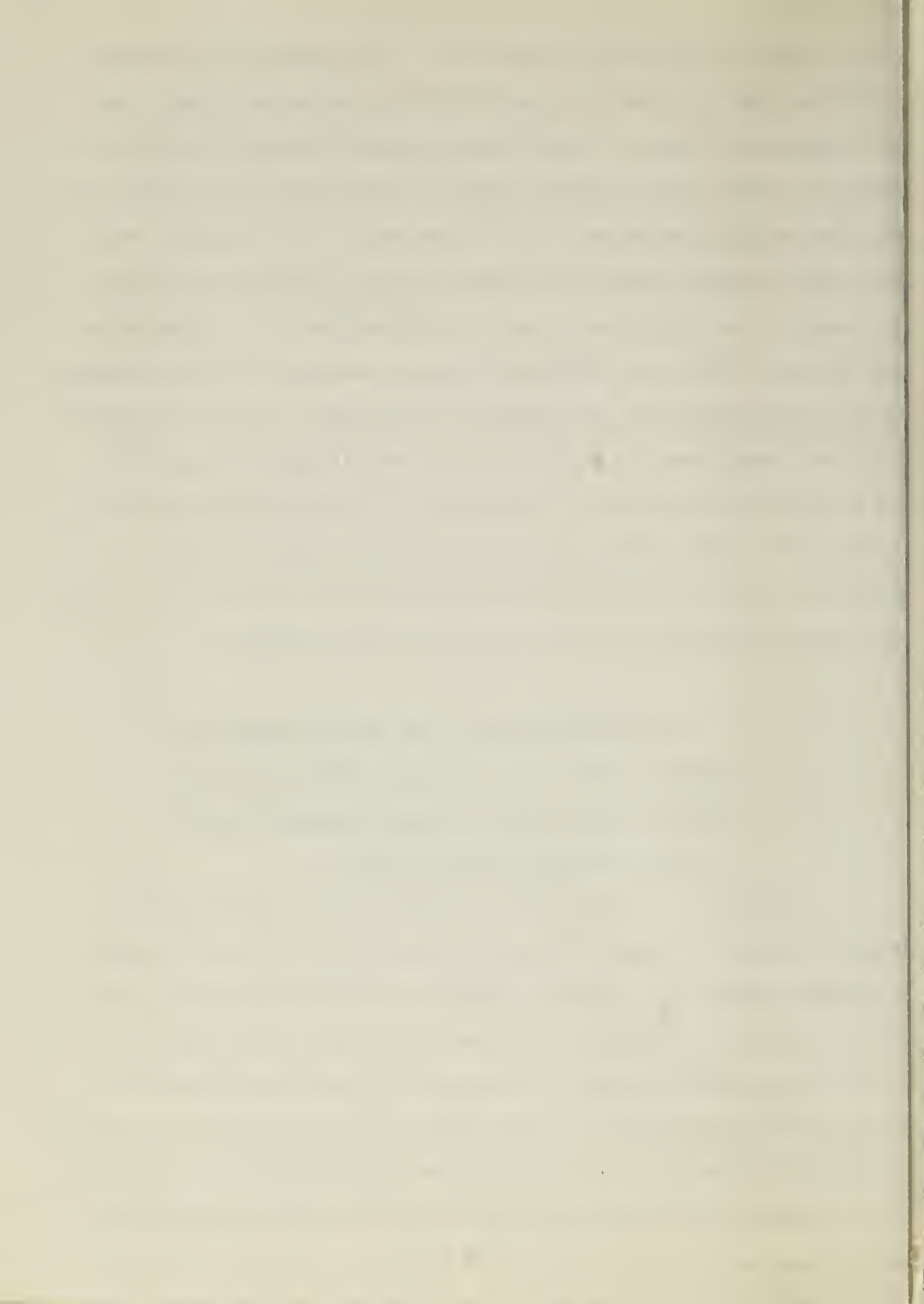
that the action filed on January 6, 1965 was commenced "local"



on the basis of the facts certified". Since the certification itself was not attached to the affidavit, we do not know what was contained therein. Since the original complaint filed contained but two counts against Milton Herbold only, and involved only the product known as Q. T. Color Balm, it is obvious that the second amended complaint filed on May 9, 1966, containing six counts, the first two of which were against the corporation only and the last four of which involved matters occurring subsequent to the filing of the original complaint, the certification could not have been the basis for the new allegations against new parties involving new transactions. If the required certification for these new charges was actually had, why did not appellee produce both certifications instead of relying upon the conclusory statements of an attorney in an affidavit?

V. THE FINDINGS THAT THE ADVERTISEMENTS IN COUNTS THREE TO SIX VIOLATED THE CEASE AND DESIST ORDER ARE REVIEWABLE WITHOUT REGARD TO THE CLEARLY ERRONEOUS RULE.

In answer to appellants' argument that the advertisements involved in Counts Three to Six did not violate the Cease and Desist Order (Br. 54-62), appellee relies solely upon Rule 52(a) F.R.Civ.P., which states that findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. It follows that if the rule is inapplicable, appellee has not disputed appellants' contention that the advertisements did not violate the Order.



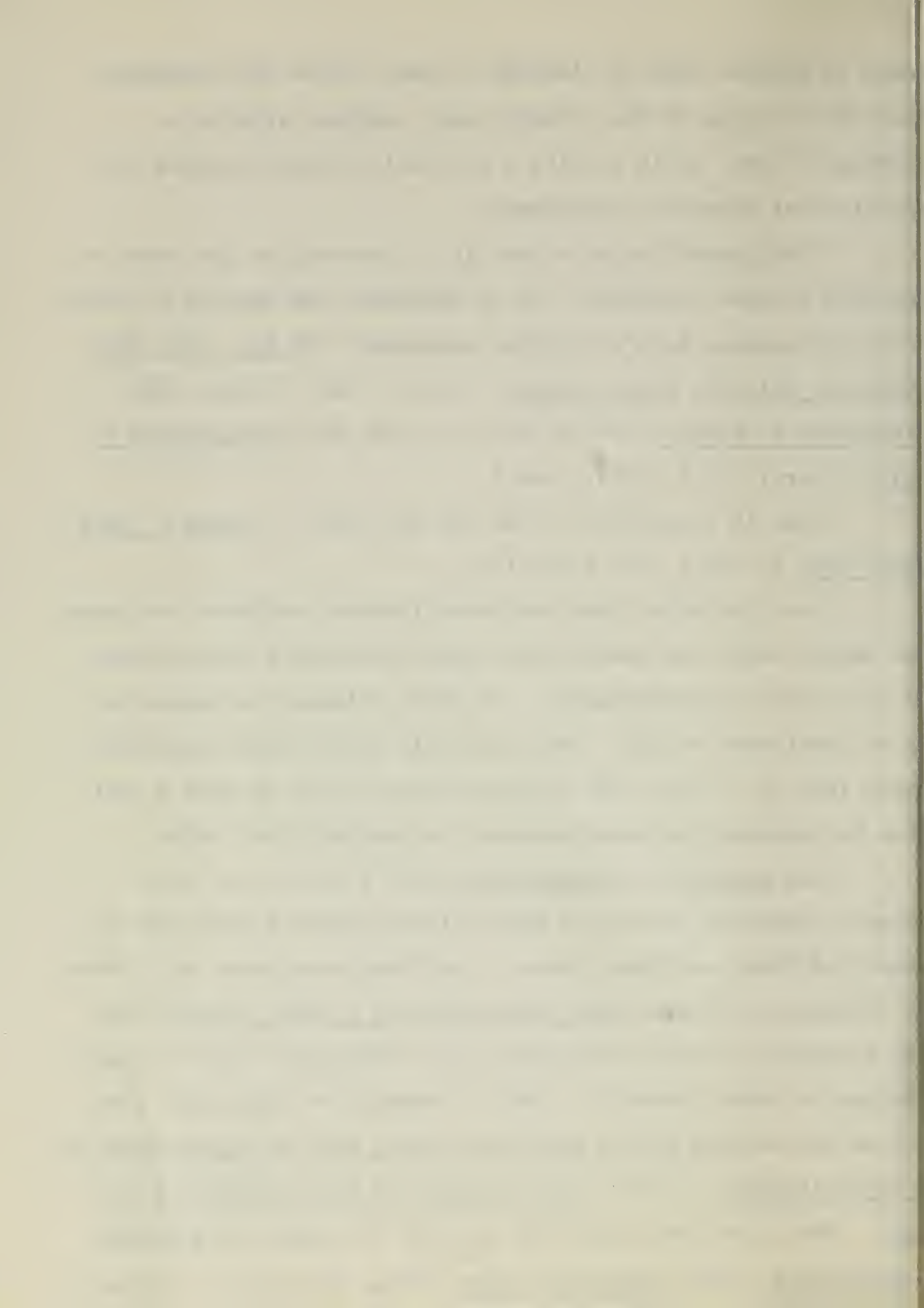
cause it applies only to findings of fact, while the determination of the judge in the instant case, although labeled a finding of fact, is in reality a conclusion based upon the construction of a written instrument.

"The general rule is that it is the duty of the court to construe written statements and to determine the meaning of plain words in whatever form of writing contained." (9 Cyc. Fed. Proc. 1967 Rev. §31.58); West v. Smith, 101 U.S. 263, 25 L.Ed. 809; Richardson v. Boston, 60 U.S. 263, 15 L.Ed. 639; MacLaughlin v. Hull (9 Cir.), 87 F.2d 641, 644.)

This is a question of law for the court. (Crowe v. Gary State Bank (7 Cir.), 123 F.2d 513.)

The conclusion that the advertisements violated the Cease and Desist Order was based solely upon the judge's construction of the printed advertisements. No other evidence was presented to or considered by him. Under the rule of the cases heretofore cited (Op. Br. p. 55), the appellate court is in as good a position to construe the advertisements as was the trial judge.

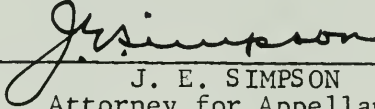
The Lundgren v. Freeman case, 307 F.2d 104, at 115, cited by appellee notes that Ninth Circuit cases follow both the so-called Frank and Clark views. The Frank view cases were based on "inferences derived from application of a legal standard and not inferences derived from having had 'experience with the main-springs of human conduct'". These comments are applicable here, for we are dealing with a conclusion based upon an application of a legal standard, to wit, the construction of a written instrument. This view, which was not involved in either the Stauffer Laboratories or the Duberstein cases, makes the clearly erroneous



finding is clearly erroneous and appellee has presented nothing to the contrary.

For each and all of the foregoing reasons, we submit that the judgment appealed from should be reversed.

Respectfully submitted,



J. E. SIMPSON
Attorney for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules and that I was responsible for the preparation of the brief.



J. E. SIMPSON
Attorney

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